[Cite as *State v. Cunningham*, 2019-Ohio-3269.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 106109
v.	:	
SELVIN CUNNINGHAM,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION FOR REOPENING GRANTED
RELEASED AND JOURNALIZED: August 14, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-614808-A
Application for Reopening
Motion No. 524221

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Callista Plemel, Assistant Prosecuting Attorney, *for appellee*.

Selvin Cunningham, *pro se*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Selvin R. Cunningham has filed a timely application for reopening pursuant to App.R. 26(B). Cunningham is attempting to reopen the appellate

judgment, rendered in *State v. Cunningham*, 8th Dist. Cuyahoga No. 106109, 2018-Ohio-4022, that affirmed his conviction and sentence for one count of corrupting another with drugs (R.C. 2925.02(A)(2)) and one count of promoting prostitution (R.C. 2907.22(A)(2)). We grant Cunningham's application for reopening.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Cunningham is required to demonstrate that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*. Cunningham has raised three proposed assignments of error in support of his application for reopening in an attempt to establish the claim of ineffective assistance of appellate counsel.

II. Improper Sentencing – Allied Offenses of Similar Import

{¶ 4} Cunningham's first proposed assignment of error is that:

> Trial court committed plain error by sentencing appellant on corrupting another with drugs and promoting prostitution when those convictions are allied offenses of similar import in violation of R.C. 2941.25(A) of the Ohio Revised Code.

{¶ 5} Cunningham, through his first proposed assignment of error, argues his appellate counsel was ineffective for failing to argue on appeal that the offenses of corrupting another with drugs and promoting prostitution are allied offenses of similar import that required merger for the purpose of sentencing.

{¶ 6} R.C. 2941.25 of the Revised Code prohibits the imposition of multiple punishments for the same criminal conduct, and provides that:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 7} The Supreme Court of Ohio, in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 89, established that the test for determining whether offenses are allied offenses of similar import requires the trial court to consider three separate factors: import, conduct, and animus. Convictions do not merge and a defendant may be sentenced for multiple offenses if any of the following are true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the

offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus. *Id*. at ¶ 25. Two or more offenses of dissimilar import exist "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus.

{¶ 8} Herein, Cunningham was convicted of the offenses of corrupting another with drugs and promoting prostitution. The elements of the offense of corrupting another with drugs are: (1) knowingly; (2) administer or furnish another or induce or cause another to use a controlled substance; (3) with purpose to cause serious physical harm to the other person, or with purpose to become drug dependent; (4) and the drug involved is a schedule 1 drug (heroin). The elements of the offense of promoting prostitution are: (1) knowingly; (2) supervise, manage, or control the activities of a prostitute in engaging in sexual activity for hire.

{¶ 9} With regard to the first factor under *Ruff*, we find that the offenses of corrupting another with drugs and promoting prostitution are dissimilar in import. Administering, furnishing, inducing, or causing another person to use drugs in order to purposely cause physical harm or purposely become drug dependent is distinct from supervising, managing, or controlling the activities of a prostitute that is engaged in sexual activity for hire.

{¶ 10} In addition, with regard to the second *Ruff* factor, we find that the offenses of corrupting another with drugs and promoting prostitution were committed separately. Finally, with regard to the third *Ruff* factor, the offenses of

corrupting another with drugs and promoting prostitution were committed with a different animus. *State v. Hill*, 8th Dist. Cuyahoga No. 107058, 2019-Ohio-698; *State v. Brooks*, 8th Dist. Cuyahoga No. 107039, 2019-Ohio-456.

{¶ 11} The trial court was not required to merge the offenses of corrupting another with drugs and promoting prostitution, because the offenses were not allied offenses of similar import. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061; *State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601. Cunningham, through his first proposed assignment of error, has failed to demonstrate that the performance of his appellate counsel was deficient and that he was prejudiced by appellate counsel not arguing on appeal the issue of allied offenses of similar import.

III. Jury Verdict Forms – Compliance with R.C. 2945.75

{¶ 12} Cunningham's second proposed assignment of error is that:

> The trial court committed plain error by sentencing appellant on a felony count of corrupting another with drugs and promoting prostitution, because the verdict forms failed to state the degree of the offenses.

{¶ 13} Cunningham, through his second proposed assignment of error, argues that he was prejudiced by appellate counsel's failure to argue on appeal that the jury verdict forms do not comply with R.C. 2945.75(A)(2). Specifically, Cunningham argues that the jury verdict forms, which were signed by the jury with regard to the convictions for the offenses of corrupting another with drugs and promoting prostitution, failed to state the degree of the offenses of which he was

found guilty or failed to state the additional element or elements of the charged offenses.

{¶ 14} R.C. 2945.75(A)(2) provides that:

> A guilty verdict shall state either the degree of the offenses of which the offender is found guilty, or such additional element or elements are present. *Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.*

(Emphasis added.)

{¶ 15} In addition, the Supreme Court of Ohio, in *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374, held that:

> In [*State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735], this court addressed the specificity that R.C. 2945.75 requires in verdict forms in cases in which the degree of an offense becomes more serious with the presence of additional elements. The court held:
>
> > [P]ursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.
>
> *Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, at ¶ 14.
>
> This court called R.C. 2945.75 "a clear and complete statute" that "certainly imposes no unreasonable burden on lawyers or trial judges." *Id.*, ¶ 12. Its dictates are simple, and the resolution of cases that do not meet its requirements is also straightforward: "The statute provides explicitly what must be done by the courts [when R.C. 2945.75(A)(1) is not followed]: the 'guilty verdict constitutes a finding of guilty of the least degree of the offense charged.' R.C. 2945.75(A)(2)." *Id.* at ¶ 13.
>
> * * *
>
> *Pelfrey* makes clear that in cases involving offenses for which the addition of an element or elements can elevate the offense to a more

> serious degree, the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed.
>
> * * *
> Thus, in this case, which involves a criminal statute in which the addition of certain elements enhances the crime of failure to comply with the order or signal of a police officer, we look *only* to the verdict form signed by the jury to determine whether, pursuant to R.C. 2945.75, [defendant] was properly convicted of a third-degree felony.

(Emphasis added.) *McDonald* at ¶ 13-18.

{¶ 16} The jury verdict form signed by the jury, with regard to Count 1, corrupting another with drugs, provided that:

> We, the Jury in this case being duly impaneled and sworn, do find the Defendant, Selvin R. Cunningham, GUILTY of Corrupting Another With Drugs in violation of §2925.02(A)(2) of the Ohio Revised Code, as charged in Count 1 of the Indictment.

{¶ 17} The jury verdict form signed by the jury, with regard to Count 2, promoting prostitution, provided that:

> We, the Jury in this case being duly impaneled and sworn, do find the Defendant, Selvin R. Cunningham, GUILTY of Promoting Prostitution in violation of §2907.22(A)(2) of the Ohio Revised Code, as charged in Count 2 of the Indictment.

{¶ 18} Upon review of the jury verdict form associated with Count 1, we find that there exists a question as to whether the jury verdict form complied with R.C. 2945.75(A)(2) and the opinion rendered by the Supreme Court of Ohio in *McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374. With regard to Count 2, promoting prostitution, we find that no prejudice befell Cunningham because the trial court imposed a sentence based upon the least degree of the charged offenses; a felony of the fourth degree.

{¶ 19} Therefore, we find that there exists a genuine issue as to whether Cunningham was deprived of the effective assistance of counsel on appeal through his second proposed assignment of error with regard to the jury verdict form involving Count 1 only.

IV. Trial Court's Failure to Inform Cunningham of Registration Requirements as a Tier One Sexual Offender

{¶ 20} Cunningham's third proposed assignment of error is that:

> The trial court committed plain error by failure to inform appellant of notice of required registrational requirements as to tier one sexual offender and journalize such as well.

{¶ 21} Cunningham, through his third proposed assignment of error, argues his appellate counsel was ineffective for failing to argue on appeal that the trial court failed to comply with the mandatory notice requirements of sex offender registration as a Tier I sex offender per R.C. 2950.03.

{¶ 22} The original sentencing hearing of July 10, 2017, the resentencing hearing and journal entry of July 25, 2017, and the resentencing hearing and journal entry of April 10, 2019, confirm that Cunningham was classified as a Tier I sex offender and informed of the requirement of registration with the sheriff of the county in which he resides upon release from prison. Based upon the record, the totality of the circumstances clearly indicate that Cunningham was informed and understood his classification as a Tier I sex offender and the resulting registration requirements. *State v. Raber*, 134 Ohio St. 3d 350, 2012-Ohio-5636, 982 N.E.2d 684; *State v. Butcher*, 12th Dist. Butler No. CA2012-10-206, 2013-Ohio-3081; and

State v. Jackson, 8th Dist. Cuyahoga No. 94460, 2010-Ohio-5844. Therefore, we find that Cunningham was not prejudiced and not deprived of the effective assistance of counsel on appeal through his third proposed assignment of error.

{¶ 23} Based upon Cunningham's second proposed assignments of error, we find that reopening of the appellate judgment rendered in *Cunningham*, 8th Dist. Cuyahoga No. 106109, 2018-Ohio-4022, is warranted. *See* App.R. 26(B)(5). However, the appeal shall be limited to the issue of whether Cunningham was prejudiced by the failure of appellate counsel to argue on appeal that the jury verdict form associated with Count 1, corrupting another with drugs, failed to comply with R.C. 2945.75. The record is deemed complete for purposes of this appeal. Attorney Louis E. Grube is appointed to represent Cunningham in the reopened appeal. Appellant's brief shall be filed by September 13, 2019. Appellee's answer brief shall be filed 20 days after the appellant's brief is filed. A reply brief, if filed by the appellant, shall be submitted ten days after the appellee's answer brief is filed.

{¶ 24} Application for reopening is granted.

MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, P.J., and
RAYMOND C. HEADEN, J., CONCUR